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JOAN KENNEDY TAYLOR, EDITOR

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VIEWS

A CASE AGAINST CONSCRIPTION

Suppose for a moment that you have just turned on your television set to watch a science-fiction fantasy. Imagine also that the name of the show for this evening is "The Check Book." In this fantasy, politicians and diplomats from every nation have gathered at a super-elite Monte Carlo to play a complicated international game called Power Politics. We see the

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gaming table surrounded by men whose faces are coldly cynical. On the gaming table are hundreds of thousands of tiny pawns in the shape of men in military uniforms. The horror of this game is that each pawn represents one human life.

As the game progresses, each politician or diplomat spins a wheel of chance. If he loses (and, as in all games of chance, he often does) some of his pawns are removed from the table permanently, and he must draw more by writing out a check. Each player has his own check book with the flag of his government embossed upon its cover -- but what is unusual is that every check book is clearly labeled "Conscriptions Unlimited." Since each player has been assured by his government of an inexhaustible supply of pawns, the game goes on forever.

In this Twilight-Zone fantasy, men forlornly and helplessly surrender their lives whenever the check with their number comes up for payment. In this fantasy, the game is endless. In reality, it need not be, because, in this country at least, men do not have to stand idly by while other men negotiate a draft upon their lives.

As was mentioned in Persuasion last month, there is now an impending challenge to the constitutionality of the Universal Military Training and Service Act (commonly called the Draft) which is also a challenge to the principle of conscription in any form and for any purpose. I will briefly cover the basic grounds for the challenge, the possible course of events, and the broad significance of the success or failure of this case.

I want to acknowledge in advance that the legal grounds for challenge which I will be reviewing in the following pages are the work of Henry Holzer and his wife Phyllis Holzer, the lawyers in this case.

The facts are as follows:

The plaintiffs in this case are Howard Katz and David Baumann, both citizens of New York City. In February of this year (1966), acting with the advice of their counsel, Henry Holzer, they initiated a complaint against the following defendants:

1. The United States,
2. Lyndon Johnson, as President and Commander-in-Chief of the Armed Forces,
3. Robert S. McNamara, as Secretary of Defense,
4. Lt. Gen. Lewis B. Hershey, as Director of the Selective Service System.

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The complaint states that both Katz and Baumann have been wrongly compelled to act by the law, under threat of imprisonment for criminal violation of the Act. Katz, under duress, joined the National Guard some years ago. Baumann, under duress, was drafted a week after the case came into being.

Katz and Baumann are seeking to have the Universal Military Training and Service Act declared unconstitutional, and they seek to bar its further enforcement against themselves or any citizen. The effect of this case is to challenge the principle of conscription for any purpose.

The Challenge

What are the grounds upon which they will assert their challenge to the centuries-old practice of forcing men to kill or be killed? There are three basic components to the challenge:

1. They will assert the moral principle that each individual has the right to his own life, his own liberty, his own happiness; conversely, they will argue that a man's life is not a pawn in the service of his government; in the service of society, in the service of the majority, nor in the service of any group of men. In this context, the lawyer's brief on the case cites not only excerpts from Eighteenth- and early Nineteenth-century political thinkers, such as James Madison, Alexander Hamilton, and Daniel Webster, but also a portion of the essay "Man's Rights" by the contemporary novelist and philosopher, Ayn Rand, which originally appeared in the April, 1963, issue of The Objectivist Newsletter. This is, to the best of my knowledge, the first time that the philosophy of Objectivism has been formally cited in any legal case involving a Constitutional issue.

2. They will argue that the Act is unconstitutional as a violation of this moral principle and, more specifically, that the Act is a violation of the Ninth Amendment to the Constitution which protects all rights not specified elsewhere, including the right to choose one's own moral standards. They will further argue that the Ninth Amendment denies to the government all powers except those explicitly delegated to the Constitution.

3. They will argue that, as legal precedent, binding upon the U. S. courts through the "Supremacy" clause of the Constitution, the Nuremberg Charter established the principle that each man is responsible for his own acts in time of war, and, according to the Charter, a man may not plead compulsion by his superiors as a defense for his wartime acts. It would follow that a man must make his own moral choice about war and his acts in war.

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This is how the three components fit together. Each man has individual rights, including the right to choose whether to fight or not to fight. These rights are protected by the Ninth Amendment. The Nuremberg Charter holds that man must make his own moral choices about war; the Universal Military Training and Service Act denies this choice by compelling him to act against his will, in violation of both his Ninth Amendment rights, and the Nuremberg Charter.

The Ninth Amendment

The Ninth Amendment has sometimes been referred to as "the Forgotten Amendment." It has been decisive in only one case in Supreme Court history: a 1965 case involving the right to use contraceptives (Griswold v. Connecticut). The Ninth Amendment reads as follows:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Its application to the draft case is as follows:

1. The Government has certain delegated powers, including the delegated power to raise armies, to maintain a navy, and so forth. Katz and Baumann are not challenging the maintenance of a military force by the government; they favor such a force. But, the government has no power to infringe some men's rights in order to defend the rights of other men, nor in order to defend the rights of society in general.

2. The Ninth Amendment defends each man's rights to choose to fight or not to fight. The courts may not legally construe the delegation of military power to mean that men have no choice in such matters; such a construction would, in fact and in practice, deny and disparage man's right to a moral choice.

3. The Act is in conflict with the Ninth Amendment and operates to deny and disparage individual rights by compelling men, under threat of imprisonment and fines,

> to take up arms against their wills,
> to risk their lives against their wills,
> to abandon their careers and loved ones against their wills,
> to enter a military service contract against their wills,
> and to abandon certain Constitutional rights against their wills.

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The implication in this defense made under the Ninth Amendment is that the government may raise armies or military forces or any force whatsoever only by hiring volunteers. Any other interpretation of the war powers is a contradiction of the whole concept of human rights. In order to argue any other interpretation, the government would have to argue that the citizens of this nation have delegated to the government the right to infringe their rights. Incidentally, this argument was the heart of the government's case in the 1917 draft cases. This circuitous nonsense is the present legal foundation for the conscription laws. This is a contradiction which will be challenged in this case.

The Nuremberg Trials

One might reasonably ask the question, how do the Nuremberg Trials come to be a part of this challenge to the Constitutionality of the U.S. draft laws?

On August 8th, 1945, the United States entered into the Agreement of London, which established an International Military Tribunal and the "Nuremberg Charter" to guide the proceedings of the tribunal. Under Article VI of the Constitution of the United States:

> "...all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This clause is commonly referred to as the Supremacy Clause. Its effect is to make any treaty supercede any federal or state laws which contradict it. Therefore, since the Nuremberg Charter is part of a treaty, if it can be shown that it is in fact contradicted by the draft law, previous decisions of the Court would imply that this would be enough to call the validity of the law into question.

The Nuremberg Charter provided in Article 8 that:

> "The fact that the defendant acted pursuant to orders of his government or of a superior shall not free him of responsibility, but may be considered in mitigation of punishment."

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Later, when the Tribunal itself interpreted the meaning of Article 8, it reported:

> "The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations is not the existence of the order, but whether moral choice was in fact possible." (Emphasis added)

As indicated earlier, Katz and Baumann are relying upon this legal precedent as a coordinate ground for their challenge to conscription. The Nuremberg Charter is in conflict with the Universal Military Training and Service Act. The Charter requires Katz and Baumann to make a moral choice; the Act denies them a moral choice. Both laws are binding upon Katz and Baumann, but they cannot obey both simultaneously.

The Course of Events

Briefly, here is what may happen in the courts.

The preliminary hearing was held on July 12 in the United States District Court for the Southern District of New York, before Judge Harold R. Tyler, Jr. Katz and Baumann have requested the convening of a three-judge court for a hearing on the merits of their arguments. The government attorney has asked that the case be dismissed, as was discussed in last month's Persuasion. As of the date this article went to press, Judge Tyler had made no decision.

If Judge Tyler does decide against the convening of a three-judge court, Katz and Baumann may appeal the ruling to the Circuit Court of Appeals and ultimately to the Supreme Court, where they may request an order directing the convening of a three-judge court. Their reasons for requesting this mandate may be presented and argued in the courts sometime this fall.

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Assuming that the Supreme Court orders a three-judge court to be convened, the case will then return to the Federal District Court for a hearing and for a decision on the merits. If, after the case is heard, the three-judge court rules that the Universal Military Training and Service Act is constitutional, Katz and Baumann may appeal the case directly to the Supreme Court for a final decision.

In my opinion, we may expect to see an extensive legal avoidance of principle during the course of this case. Many lawyers and jurists seem to be on the premise that every challenge to the law is wrong per se. For example, the government, as a matter of record, has already successfully defended the draft in the 1917 cases (which did not challenge conscription as a violation of the Ninth Amendment, but as a form of the "involuntary servitude" forbidden by the Thirteenth Amendment) by citing conscription practices in most countries throughout the world, including some of the bloodiest dictatorships in history. In essence, this argument amounts to: If other countries infringe the rights of their citizens, why can't we?

The draft case thus raises major legal-philosophical questions which have never been directly answered by any legislature or any courts in the history of the United States. If the Supreme Court obfuscates the grounds for its decision, or denies man's right to life, then the foundation will have been laid for an extension of some of the police state tactics which currently prevail in limited areas.

If, however, this case succeeds in its limited goals; if the Supreme Court does answer these questions directly, and if it affirms man's right to his own life, the course of our Constitutional history may change rapidly. This draft case is not just an isolated defense of two men's right to their lives. It is, in fact, a broad challenge to government infringement of life, action, and property.

To permit one's government to write a draft upon the life of any man is an example of what Ayn Rand calls "moral cannibalism:" it is to subscribe to the view that some men may consume others--like aboriginal savages.

There are many ways to fight this battle, but, in the months to come, guard against the subtle innuendo in the arguments of those men who will say that the draft is a practical necessity for the survival of our political system. Hold in the forefront of your thoughts that the draft is nothing less than cannibalism and that your opponent is inviting you to the feast.

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This draft case is a battle; hopefully the first of many, but certainly not the decisive battle in the long struggle for individual rights. If the present case doesn't succeed in the courts--and there is good reason to suspect that it will encounter many difficulties--then we can still seek a Constitutional Amendment outlawing conscription. There will be and must be other challenges under the Ninth Amendment, and the same principles will and must be exerted in each new challenge. Ultimately, the "Forgotten Amendment," the Ninth Amendment, may become the most precious part of the Bill of Rights.

--Lawrence A. Scott

Editorial Note: As we go to press, Persuasion has been informed that Judge Tyler has just ruled against the plaintiffs, Katz and Baumann, and has not directed the convening of a three-judge court. This ruling will be appealed.

R E V I E W S

ORGANIZED JUSTICE, OR ORGANIZED INJUSTICE?

The Law, by Frederic Bastiat, translated by Dean Russell. The Foundation for Economic Education, Inc., Irvington-on-Hudson, New York, 1950 (5th Printing, 1964)

It is a pleasure to write this review, for it is a delighted one. The author has been dead for 116 years, and yet he could have written this short book yesterday. Actually, it is more of a long pamphlet than a short book--one of a series of such works by Bastiat which attacked socialism (as well as all forms of political collectivism).

Frederic Bastiat (1801-1850) was a "free trader"--he helped organize the first French association dedicated to ending protectionism. He was also a member of the French legislature. He hated tyranny, and he attacked it not only with passion but with logic. His attack had its foundation in a rigorous and relentless espousal of man's natural rights. His tactic is to expose the contradictions in the ideas of his enemy.

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The Law is an examination of two opposing views of the function of law: the view that the sole function of the law is the defense of rights, and the view that the law should in some way take property from some men for the benefit of others, an approach which Bastiat calls "legal plunder." There are only three possibilities, he says. "The few plunder the many," which is the case when the right to vote is restricted. "Everybody plunders everybody," which is the general result of extending the franchise in a government where the law is viewed as philanthropic. And "no legal plunder." It is this last view, of course, which M. Bastiat considers the only proper one.

Law, according to Bastiat, is a negative concept -- strictly speaking, its purpose is not to cause justice, but rather "the purpose of the law is to prevent injustice from reigning." (p.29) In other words, justice in the political context automatically exists whenever men are prevented from violating the rights of others.

It is when men try to use law positively to achieve ends other than the cessation of injustice that tyranny begins. For instance, when political leaders wish to equalize incomes, or opportunity, or education, or social status. "The law can be an instrument of equalization only as it takes from some persons and gives to other persons. When the law does this, it is an instrument of plunder." (p.31) This same consequence follows from the application of the law to protection of industry by tariff, to special favors to the poor through high taxation of the rich, to the provision of education by the state (here he is more consistent than John Locke, who advocated government support of education), or to any end other than the organising of justice. Why? Because only justice requires the use of force; all the other activities of man do not. Men can trade, produce, and educate without using force.

His case actually begins with a definition, that of man. "Life, faculties, production -- in other words, individuality, liberty, property -- this is man." (p.6)

He states that each man has a natural right "to defend his person, his liberty, and his property. These are the three basic requirements of life, and the preservation of any one of them is completely dependent upon the preservation of the other two. For what are our faculties but the extension of our individuality? And what is property but an extension of our faculties?" (p.6)

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How is such protection to be achieved? Through law, which is "the collective organization of the individual right to lawful defense." (p.6) Later, he shortens his definition: "Law is organized justice." (p.24) For him, this is the law's purpose. He considers as illegitimate "protective tariffs, subsidies, guaranteed profits, guaranteed jobs, relief and welfare schemes, public education, progressive taxation, free credit, and public works. You will find that they are always based on legal plunder, organized injustice." (p.31)

Why this is so, he points out, lies in the nature of law, and it is here that his insight is sharpest. "We must remember law is force, and that, consequently, the proper functions of the law can not lawfully extend beyond the proper functions of force." (p.28) Thus, it should not be used for philanthropic ends by organizing labor, or business, or education -- because force would have to be used to do so. "The law cannot organize labor and industry without organizing injustice." (p.29)

So Bastiat attacks what he thought was the most pernicious of political assumptions of the time -- an assumption that had been unchallenged for centuries -- the idea that the legislator or the law is and should be a source of blessings, an agent that "moves, controls, benefits, and improves mankind." (p.37) Socialists (and others with collectivist ideals) view the relationship between the legislature and the people as being the same as that between the farmer and his land, the husbander and his livestock. Bastiat points out how, in effect, the socialists see man as primarily passive and plastic, as there, to be shaped, managed, changed, and improved by the use of law, that is, through force. Thus, injustice, organized and institutionalized, is a necessity to socialism.

As an aside he points out the obvious contradiction in the implied idea held by collectivists that man by nature doesn't know what is best for him, and so some men (who somehow supposedly don't share this nature) have to decide it for him.

This book was written in 1850 -- and because of Bastiat's use of logic, his insistence upon speaking in terms of principle, he could see with terrible clarity. Here is a comment of his, written eleven years before the United States Civil War, about the United States. "There is no country in the world where the law is kept more within its proper domain: the protection of every person's liberty and property. As a consequence of this, there appears to be no country in the world where the social order rests on a

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firmer foundation. But even in the United States, there are two issues -- and only two -- that have always endangered the public peace....They are slavery and tariffs. These are the only two issues where, contrary to the general spirit of the republic of the United States, law has assumed the character of a plunderer. Slavery is a violation, by law, of liberty. The protective tariff is a violation, by law, of property..It is a most remarkable fact that this double legal crime -- a sorrowful inheritance from the Old World -- should be the only issue which can, and perhaps will, lead to the ruin of the Union. It is indeed impossible to imagine, at the very heart of a society, a more astounding fact than this: The law has come to be an instrument of injustice. And if this fact brings terrible consequences to the United States -- where the proper purpose of the law has been perverted only in the instances of slavery and tariffs -- what must be the consequences in Europe, where the perversion of the law is a principle; a system?" (pp. 18-19)

Bastiat's summation has the character of absolute principle. He allows no exceptions, no loopholes. "Whatever the question under discussion.... I invariably reach this one conclusion: the solution to the problem of human relationships is to be found in liberty." (pp. 72-73)

For him, the only proper governement is that which protects rights and does not "regulate our consciences, our ideas, our wills, our education, our opinions, our work, our trade, our talents, or our pleasures." (p.67)

The translation maintains a clarity of language which tempts the reader to copy at least every other paragraph as a quotation, and is idiomatic and contemporary throughout. Only two ideas in any way date this book -- Bastiat's assumption that as history progresses governments have of course grown less despotic, and his particular brand of religion, which injects no theology or dogma into politics, but assumes that God made man of such a nature as to require liberty, and that therefore it would be an act of religious celebration to institute a proper, just, and free government among men.

He wrote to attack socialism.. The attack continues. He wrote to create the only kind of weapon effective against ideas -- namely, other ideas. The weapon is still sharp.

-- David J. Dawson

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